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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-117

CHARLES JOSEPH KASTIGAR and
MICHAEL GOREAN STEWART,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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Interest of *Amici**

The American Civil Liberties Union is a nation-wide, non-partisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with those societal values embodied in the Fifth Amendment's privilege against self-incrimination.

* Letters of consent to the filing of this brief from the attorneys for the respective parties have been filed with the Clerk.

The Fifth Amendment Privilege plays a central role in our accusatorial system of justice. It safeguards the individual against overbearing inquiries by the State. Yet, as reflected in these cases, it is once again under attack by legislatures and the courts.

The purpose of this brief is to identify the policies underlying the Privilege and to demonstrate that the requirement of full transactional immunity is the minimally tolerable erosion of the fundamental right of silence protected by the privilege. Finally, the brief points out certain procedural deficiencies unique to the legislative arrangement embodied in the federal statute.

Introduction and Summary of Argument

The issue in this case is the constitutionality, under the Fifth Amendment, of the central provision of the Organized Crime Control Act of 1970. That statute, part of the new provisions governing Immunity of Witnesses, provides for what is commonly known as "use immunity." The statute, 18 U.S.C. Section 6002, states that a witness before a federal court or agency or legislative committee may not rely on the Fifth Amendment Privilege as a basis for refusing to answer questions or provide other information. In exchange for this withdrawal of the privilege, the statute offers the following:

> . . . but no testimony or other information compelled under the order (or any information directly or in-

> directly derived from such testimony or other information) may be used against the witness in any criminal case . . .

We submit that this limited immunity is grossly inadequate to supplant the privilege against self-incrimination, even assuming *arguendo* that any grant of immunity would be adequate.

In our amicus curiae brief filed in the companion cases of *Zicarelli* v. *New Jersey State Commission of Investigation,* No. 69-4, and *Sarno* v. *Illinois Crime Investigating Commission,* No. 70-7, which raise the issue of the constitutionality of similar provisions, we argued that a grant of complete transactional immunity was the minimally acceptable substitute for the privilege. We also argued that the decision and reasoning in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964) did not require a different conclusion. In Points I and II, *infra,* we will briefly summarize these two arguments. But for their full development, we respectfully refer the Court to our brief filed in *Zicarelli* and *Sarno.*

However, we think that there are certain factors unique to the federal immunity statute at issue here, which suggest additional reasons for invalidating the federal statutory arrangement. In Point III, *infra,* we briefly discuss those issues.

I.

Full Transactional Immunity Is the Minimally Acceptable Substitute for the Fifth Amendment Privilege to Remain Silent.

The premise against which any immunity statutes must be judged is that the Fifth Amendment has consistently been thought to afford individuals the cherished right to remain silent. Accordingly, *any* device, be it immunity statute or truncheon, which operates to breach that silence and compel a man to confess criminal conduct runs afoul of the purpose of the constitutional privilege and impairs the societal policies which that privilege seeks to further.

As this Court has recognized on numerous occasions, the privilege was written against the background of the abuses perpetrated by England's Star Chamber and High Commission through use of the oath *ex officio*. Those inquiries were usually directed at the "crimes" of political or theological dissent. See *Miranda* v. *Arizona,* 384 U.S. 436, 458-60 (1966). In effect the privilege was intended to prevent the state from rummaging through the closets of the mind in search of the secrets contained therein.

In this respect the values safeguarded by the Fifth Amendment privilege dovetail with those protected by the Fourth Amendment and together provide a right of privacy against governmental intrusion. The ultimate relationship between these two constitutional safeguards was enunciated almost a century ago in *Boyd* v. *United States,* 116 U.S. 616 (1886), where the court noted that "the Fourth and Fifth Amendments run almost into each other." *Id.* at 630. As former Chief Justice Warren put it,

> . . . the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *U. S.* v. *Grunewald,* 233 F.2d 556, 579, 581-82 (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957). *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).

These principles help illuminate the way in which this Court has considered the more particular issues of the validity of immunity statutes. Since this Court's initial consideration of these issues in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), two theories competed for acceptance. One theory holds that *no* immunity statute is constitutionally sufficient to displace the privilege and compel a man to speak. This view was enunciated in 1807 by Chief Justice Marshall, almost commanded a majority in *Brown* v. *Walker,* 161 U.S. 591 (1896), and was articulated by Justice Douglas, joined by Justice Black in *Ullmann* v. *United States,* 350 U.S. 422 (1956).

This absolute position (with which we fully concur) has not prevailed. Instead, this Court has adopted the rule that a grant of immunity from prosecution is the minimally acceptable substitute for the privilege. However, the doctrinal tension has always been between the minority view, that the privilege and its underlying policies affords the complete right to silence, and the prevailing view that statutes which grant transactional immunity are sufficient. Thus, the debate has always been between silence and transactional immunity, not between transactional immunity and something less. The transactional immunity rule has prevailed not over the argument that it afforded

too much protection, but over the objection that it gave too little. See *Catena* v. *Elias,* —— F.2d ——, 40 Law Week 2123 (3rd Cir. 9/2/71, *en banc*).

Thus in *Counselman* v. *Hitchcock, supra* the Court considered the validity of the first federal use immunity statute and held it unconstitutional because it failed to afford "absolute immunity against future prosecution for the offense to which the question relates . . ." *Id.* at 586. In ruling that full transactional immunity was the minimally acceptable erosion of the privilege against self-incrimination, the Court effected an intended compromise between the position of Chief Justice Marshall—that the privilege was tantamount to a right to remain silent—and the exclusionary-type rule embodied in such decisions as *People* v. *Kelly,* 24 N.Y. 74 (1861).

In response to the constitutional requirements enunciated in *Counselman,* Congress enacted a transactional immunity statute. See 27 Stat. at L. 443 (1893). In *Brown* v. *Walker,* 161 U.S. 591 (1896), a challenge to the validity of that statute reached this Court. By a narrow 5-4 vote, the Court upheld the constitutionality of the transactional immunity provision, holding that "if no such prosecution be possible —in other words, if his testimony operate as a complete pardon for the offense to which it relates—a statute absolutely securing him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595. Four Justices dissented, reasoning that transactional immunity was insufficient to displace the privilege. Justice Shiras' opinion found such statutes deficient in a variety of practical respects. Justice Field concluded that the Fifth Amendment guaranteed "a shield of absolute silence" protecting the individual not only against criminal

prosecution, but against "infamy and disgrace" as well. 161 U.S. at 630-31.

Throughout the sixty years following *Brown* v. *Walker*, this Court consistently reaffirmed the transactional immunity rule. See *Hale* v. *Henkel*, 201 U.S. 43 (1906); *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924); *United States* v. *Monia*, 317 U.S. 424 (1943); *Adams* v. *Maryland*, 347 U.S. 179 (1954).

Finally, in *Ullmann* v. *United States*, 350 U.S. 422 (1956) the issues raised in *Counselman* were once again explored. Justice Frankfurter, writing for the majority of the Court, upheld the constitutionality of the transactional immunity provision which had become "part of our constitutional fabric." Justices Douglas and Black dissented, advocating adoption of the view of the *Brown* dissenters "that the right of silence created by the Fifth Amendment is beyond the reach of Congress." 350 U.S. at 440.

In sum, from *Counselman* through *Ullmann* there was no authority whatever for the proposition that something less than full transactional immunity could adequately supplant the Fifth Amendment privilege. Transactional immunity has consistently been regarded as the minimal protection that could be afforded to a witness. To the extent that there was any dissent from the *Counselman* rule, such opposition has traditionally argued that transactional immunity did not provide enough protection.

II.

Where Only One Jurisdiction Is Involved, *Murphy* v. *Waterfront Commission* Is No Bar to the Requirement of Full Transactional Immunity.

The recent suggestion that the Fifth Amendment only requires the inquiring sovereign to grant use immunity in order to abrogate the witness' privilege, as embodied in this federal statute, is premised on certain language in *Murphy* v. *Waterfront Commission, supra.* See *Uniformed Sanitation Men's Association Inc.* v. *Commissioner of Sanitation,* 426 F.2d 619 (2d Cir. 1970). This was the basis for the decision below. But *Murphy,* properly read, is consistent with the doctrine that as between the witness and an inquiring sovereign, particularly where the latter is a federal agency, nothing less than full transactional immunity will satisfy the Fifth Amendment.

In *Murphy,* the witness, already granted transactional immunity by the state, argued that he nevertheless had no protection against the federal government. The Court agreed, holding that the witness could not be made to incriminate himself unless that information could not be used by federal officials. 378 U.S. at 79. The decision was a recognition of important needs of federalism. Since a state lacked the power to grant immunity from prosecution by other states or the federal government, to have required it to do so would have meant that no state could inquire into incriminating areas at all. Moreover, *Murphy* was an extension of the privilege because it overruled decisions which had held that *no* immunity was required as against the non-inquiring sovereign. It is ironic now to suggest that because *Murphy* did not go so far as to require that

transactional immunity be granted by all sovereigns, then transactional immunity need not be conferred by any sovereign, even the one that compels the witness to yield his right to remain silent.

Moreover, when the federal government makes the incriminating inquiry, not only must it afford transactional immunity itself, but it can offer a grant of immunity binding on all state or local agencies. When the federal government inquires in exchange for a grant of transactional immunity, none of the dilemmas posed by the *Murphy* inter-jurisdictional situation are presented. Ever since *Brown* v. *Walker, supra,* this Court has held that by virtue of the Supremacy Clause a federal grant of transactional immunity is binding upon all state prosecutorial agencies,

> It is argued in this connection that, while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several states, except so far as the 14th Amendment may have made them applicable [citations omitted].
>
> There is no such restriction, however, upon the applicability of Federal statutes. The 6th article of the Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall

> be made under the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding". 161 U.S. at 607. See also, *Adams* v. *Maryland, supra; Reina* v. *United States,* 364 U.S. 507 (1960).

That *Murphy's* exclusionary rule aspect is limited to the type of situation involved there has been recognized by subsequent decisions of this Court reaffirming the continued vitality of *Counselman.* See, e.g., *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 80 (1965); *Stevens* v. *Marks,* 383 U.S. 234, 244-45, 249-50 (1965).

Moreover, the court below stands alone in holding that *Murphy* did impair *Counselman* and authorizes the kind of limited immunity embodied in this statute. Decisions by federal courts in the Second Circuit, see *In the Matter of the Grand Jury Testimony of Joanne Kinoy,* 326 F. Supp. 407 (S.D.N.Y. 1971), the Seventh Circuit, see *In re Korman,* —— F.2d ——, 39 Law Week 2681 (5-20-71), and just recently the Third Circuit, see *Catena* v. *Elias,* —— F.2d ——, 40 Law Week 2123 (*en banc,* 9-2-71) have invalidated use immunity statutes. As the Seventh Circuit succinctly put it,

> We hold that *Counselman* remains the binding, authoritative exposition of the minimal constitutional requirements for immunity statutes. Those minimal constitutional requirements prohibit the Federal Government, absent a grant of absolute immunity from prosecution for any transaction to which his compelled testimony relates, from committing for contempt a witness who relies on his fifth amendment privilege and refuses to testify. —— F.2d at ——, 39 Law Week at 2681.

Nothing in *Murphy* v. *Waterfront Commission* requires a contrary conclusion.

III.

The Statutory Arrangements Surrounding the Immunity Provision Foster Severe Uncertainty for the Witness and Authorize Substantial Violations of the Fourth Amendment.

For the reasons outlined in points I and II, *supra,* the immunity provision of section 6002 is patently inconsistent with the requirements of the Fifth Amendment as enunciated in the decisions of this Court. That, of course, is the precise issue in this case, and this Court's precedents provide ample grounds for a holding of unconstitutionality. But beyond that, the legislative arrangement is deficient in two other respects which reflect upon the validity of the immunity provision itself. First, Congress, hedging its bets, has retained transactional immunity provisions in a variety of hard-core federal criminal areas. The result is a legislative patchwork that can only confront the witness with extreme uncertainties. Second, the statute provides a method for obtaining compulsive orders which violates the interests protected by the Fourth, as well as the Fifth Amendments.

A. *The optional immunity procedures allowed by the statute create the kind of "intricate scheme" of immunity forbidden by the Fifth Amendment.*

In many respects the Immunity of Witnesses statute is a departure from the federal statutory arrangements which existed prior to 1970. But perhaps the central feature of the statute is its ambivalence. It is clear, of course, that

the immunity provision involved in this case was obviously intended to confer only use immunity instead of the protection of transactional immunity which had traditionally been afforded under federal immunity statutes since 1893. But due perhaps to uncertainty as to whether a grant only of "use" immunity would be constitutionally permissible, Section 227 of the Organized Crime Control Act delayed the repeal of the 18 U.S.C. Section 2514 "transactional" immunity standard until 1974.[1]

As a result of the saving provision, 18 U.S.C. 2514 continues to provide for "transactional" immunity "before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in Section 2516 . . . " And the offenses enumerated in Section 2516 are the following:

> (a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);
>
> (b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

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[1] Section 227(a) of P.L. 91-452 reads as follows: "Section 2514 of Title 18, United States Code, is repealed effective four years after the effective date of this Act."

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations);

(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

We suspect that this duality in the legislative arrangement was due to Congressional uncertainty as to the constitutionality of use immunity. But whatever the cause, the effect on the witness is one of severe uncertainty. In numerous situations transactional immunity might still be available. But the witness can never be certain in the particular situation whether use or transactional immunity will be afforded, because the availability of transactional immunity is completely within the unfettered discretion of the prosecuting attorney. As District Judge Hanson has said in a recent interpretation of 18 U.S.C. 6002, "the language [of 6002] is not mandatory; the presiding officer may choose to seek an order under the provisions of another enactment such as 18 U.S.C., Section 2514." *In re Brown,* —— F. Supp. ——, 40 Law Week 2084, 2085 (S.D. Iowa, 7/12/71). Thus the witness will in many situations be entering the grand jury room without knowing whether transactional or use immunity will be conferred and without the benefit of counsel to clarify the uncertainties. Therefore, quite apart from the question of the scope of immunity necessary to satisfy the Fifth Amendment, it remains apparent that Section 227 of P.L. 91-452 creates a situation of statutory ambiguity and uncertainty which in itself is constitutionally impermissible.

The optional immunity procedure created by Section 227 is the kind of "intricate scheme" condemned by this court in *Stevens* v. *Marks, supra* when it declared:

> The State may not substitute for the privilege against self-incrimination an intricate scheme for con-

ferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. 383 U.S. at 246.

The complexities of the present statutory scheme are constitutionally defective insofar as they subject witnesses to the uncertainties of not knowing whether they will be protected by use or transactional immunity, particularly since they face hostile questioning behind the closed doors of the grand jury room unrepresented by counsel. Moreover, practical experience as revealed by such cases as *Raley* v. *Ohio*, 360 U.S. 423 (1959)[2] and *Stevens* v. *Marks*, *supra*,[3] points to the existence of overzealous prosecutors and indicates the necessity for unambiguous standards and proscriptions to witnesses from the vagaries of prosecutorial zeal and discretion and the resulting coercion created by uncertainty.

B. *The method for obtaining compulsive orders under Section 6003 violates the Fourth Amendment prohibition against unreasonable searches and seizures.*

The majority opinion in *Ullmann* v. *United States, supra,* clearly affirmed the proposition that transactional immunity presents the maximum tolerable erosion of the Fifth Amendment. Nevertheless, *Ullmann* did not settle "fundamental questions of procedure .... [relating] to the manner in which the government's application for an order compelling testimony before the grand jury should be handled." See *In re Bart,* 304 F.2d 631, 634 (D.C.C.A., 1962). These

[2] *Raley* involved a situation where the existence of immunity was never suggested to the witness.

[3] *Stevens* v. *Marks* involved a public officer who was held in contempt of court for refusing to testify after he withdrew a waiver of the privilege.

fundamental procedural problems are elevated to questions of constitutional magnitude by the recently enacted immunity statute. See *Boyd* v. *United States, supra.*

Section 6003 of the statute requires that the United States District Court shall issue an order compelling an individual to give testimony or to provide other information when in the opinion of the United States Attorney "(1) the testimony or other information . . . may be necessary to the public interest, and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination," and when approval for the order has been obtained by the Attorney General or a designated subordinate. The sole test of whether the order shall be issued is whether, in the judgment of the United States Attorney, the testimony is "necessary to the public interest." Thus an individual can be ordered to produce his most personal papers if in the opinion of the United States Attorney their revelation would be "necessary to the public interest." The statute, on its face, does not even require a factual showing that the compelled testimony or documents are necessary to the public interest.

To require the compulsory production of testimonial or documentary evidence merely upon the unfettered judgment of the United States Attorney clearly violates the Fourth Amendment prohibition against unreasonable searches and seizures. The court must exert some supervisory control to assure that Fourth Amendment rights are not violated. The government should not be permitted to obtain by court order under Section 6003 what it could not accomplish without a search warrant based upon probable cause.

At the very least, the United States Attorney should be required to *demonstrate* that the production of the desired evidence is necessary to the public interest. And even then the statutory standard herein, "necessary to the public interest," is totally inconsistent with the test of "reasonableness" required by the Fourth Amendment. The "public interest" test imposes no restrictions upon the scope of the inquiry and the extensiveness of the compulsion. Yet it is well recognized that the Fourth Amendment prohibits subpoenas which sweep too broadly. See *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *Hale* v. *Henkel, supra; McMann* v. *S.E.C.*, 87 F.2d 377 (2d Cir., 1937), *cert. den. sub nom. McMann* v. *Engel*, 301 U.S. 684 (1937); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946).

In his opinion in *Matter of Grand Jury Subpoena Duces Tecum Addressed To Provision Salesmen and Distributors Union, Local 627, AFL-CIO*, 203 F. Supp. 575, 578 (S.D.N.Y. 1961), Judge Herlands analyzed the standard of "reasonableness" imposed by the Fourth Amendment:

> The courts have found that reasonableness, in [the] context [of the Fourth Amendment] has three components. The subpoena duces tecum may command only the production of things relevant to the investigation being pursued. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *Brown* v. *United States*, 276 U.S. 134, 143, 48 S.Ct. 288, 72 L.Ed. 500 (1928); *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298, 306-307, 44 S.Ct. 336, 68 L.Ed. 696 (1923); *Hale* v. *Henkel*, 201 U.S. 43, 77, 26 S.Ct. 370, 50 L.Ed. 652 (1960). The subpoena must specify the things to be produced with reasonable

particularity. *Brown* v. *United States,* 276 U.S. 134, 143, 44 S.Ct. 336, 68 L.Ed. 696 (1928); *Hale* v. *Henkel,* 201 U.S. 43, 77, 26 S.Ct. 370, 50 L.Ed. 652 (1906). The subpoena may order the production of records covering only a reasonable period of time. *Brown* v. *United States,* 276 U.S. 134, 143, 44 S.Ct. 336, 68 L.Ed. 697 (1928); *Schwimmer* v. *United States,* 232 F.2d 855, 863 (8th Cir. 1956), cert. denied 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); *United States* v. *Medical Society,* 26 F. Supp. 55, 57 (D.C.D.C. 1938); *In re Eastman Kodak,* 7 F.R.D. 760, 763 (W.D.N.Y. 1947).

But when measured against these three components of reasonableness, the statute at bar proves constitutionally defective. Section 6003 permits prospective orders to be issued against "any individual who . . . may be called to testify" and who "is likely to refuse to testify." But, because prospective orders are necessarily anticipatory and must be issued before the witness actually testifies the District Court is deprived of the opportunity to examine the relevancy of desired evidence within the context of actual testimony. The new statute permits the issuance of orders of compulsion by district courts "to possible witnesses in exchange for undescribed evidence of undisclosed value in unidentified investigations." See *In re McElrath,* 248 F.2d 612, 615 (D.C. Cir. 1957).

Prospective orders mandated by the instant statutes do not permit the contextual examination of evidence which is necessary to insure that the United States Attorney is not exceeding the limitations imposed by the Fourth Amendment.

These two deficiencies—the uncertainties created by the saving provision and the violations of Fourth Amendment

rights authorized by Section 6003—are analytically independent of the immunity provisions of Section 6002. But they reflect the legislative mood in which that central provision was enacted. We submit that these defects must be taken into account in the Court's consideration of the constitutionality of the central provision.

CONCLUSION

For the reasons set forth above, the decision below should be reversed and the immunity provision in 18 U.S.C. Section 6002 should be held violative of the requirements of the Fifth Amendment.

Respectfully submitted,

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